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Supreme Court of the United States

OCTOBER TERM, 1949

No. 230 230

SWIFT & COMPANY PACKERS, et al.,

Petitioners,

versus

COMPANIA COLOMBIANA del CARIBE, SA,

Respondent.

BRIEF IN BEHALF OF PETITIONERS

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and
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Proctors for Petitioners.

DEUTSCH, KERRIGAN & STILES,
Of Counsel.

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I

Official Reports of Opinions Below

The original majority and dissenting opinions of the Court of Appeals for the Fifth Circuit were filed May 30, 1949 (Tr 128 et seq.). The majority and dissenting opinions of that court on application for rehearing were rendered July 20, 1949 (Tr 153 et seq.). All four opinions of the Court of Appeals for the Fifth Circuit are reported at 175 F2d 513, et seq.

The original memorandum opinion rendered March 31, 1948 by the judge of the District Court of the Canal Zone,

upholding the position of petitioners (Tr 49) does not seem to have been reported. Subsequent opinions of the successor district judge, rendered September 30, and November 5, 1948, reversing his predecessor (Tr 72, 107) are reported at 83 F. Supp. 273.

II

Basis of Jurisdiction

Jurisdiction of this court was invoked by petition for certiorari under *section 1254* of *Title 28* of the *United States Code*. Certiorari was granted on October 10, 1949.

III

Statement of the Case

The proceeding under review was instituted originally by libel in admiralty for loss during late January, 1948, of a cargo of rice from the Motor Vessel CALI, which foundered while en route from Ecuador to Cuba. Half of the cargo was owned by Swift & Company, Packers, a Nevada corporation, and the remainder by citizens of Cuba, except for one parcel owned by a Colombian.[1]

The Motor Vessel CALI was owned by Compania Transmaritima Colombiana, a Colombian corporation, hereinafter simply called Transmaritima. This company also owned another vessel called the ALACRAN. Libel was filed in behalf of Swift & Company and the other cargo

[1] Libel, tr 1, et seq. The shipments were all made under bills of lading expressly claimed to be subject to the Carriage of Goods by Sea Act of the United States (Tr 34, 37, 40).

owners (each for its own interest), on March 7, 1948, in the District Court of the Canal Zone, against Transmaritima, jurisdiction being sought by attachment of the ALACRAN.[2]

The vessel was attached by the marshal on March 8.[3] On the same day a supplemental and amended libel was filed, alleging that libelants had just learned that an attempt had been made, on or about March 4, 1948, to transfer the Steamship ALACRAN, renamed CARIBE, to a Colombian corporation just formed by the beneficial owners of Transmaritima, in anticipation of the assertion, and in fraud, of libelants' rights. This new corporation was Compania Colombiana del Caribe, hereinafter simply called Caribe.[4]

It was further alleged that the attempted transfer of the vessel was fictitious, that the two companies were actually one, and that Caribe was in fact the *alter ego* of Transmaritima. The amended libel prayed for attachment of the vessel in the hands of both companies, or in the hands of Caribe as in fact the property of Transmaritima or as security for the alleged purchase price in the purported act of sale.[5]

To this supplemental libel, were annexed searching interrogatories, requiring Caribe to state under oath, all of the facts surrounding formation of that company, and the purported transfer of the vessel to it.[6] The vessel was again attached by the marshal on the same day.[7]

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[2] Libel, tr. 1, et seq.
[3] Tr 11-14.
[4] Tr 15, et seq.
[5] Ibid.
[6] Tr 18-20. These interrogatories have never been answered (See *post*).
[7] Tr 21-23.

On March 15, the master of the vessel claimed her as property of Caribe;[8] and that company moved to dismiss the libel and vacate the attachment of the vessel on the grounds that the action was between foreigners, that the alleged fraudulent transfer of the vessel raised issues which ought to be decided only in Colombia, and that "no sufficient cause has been alleged why this court should hear this matter."[9]

Attached to this motion, was a document denominated an affidavit, executed by proctor for both Transmaritima and Caribe, setting forth his argument in support of his motion,[10] annexing a copy of the "certificate of registry" of the vessel at Barranquilla, Colombia on March 4,[11] and the opinion of a Colombian lawyer that "the Courts of justice of the Canal Zone are absolutely incompetent to decide regarding a claim of this nature."[12]

On March 31, the judge of the district court overruled the motion to dismiss the libel and vacate the attachment, and refused to decline jurisdiction.[13] The district judge retired on the following day,[14] and none was appointed to succeed him until the end of June.[15]

On June 11, 1948, more than two months after filing of the libels, answers thereto were filed by the same proctor in behalf of both respondents.[16]

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[8] Tr 23-25.
[9] Tr 25-26.
[10] Tr 27-32. "On the same day the new company by its proctors made a motion, supported by an affidavit which is mainly a legal argument . . ." Opinion of Court of Appeals, Tr 129.
[11] Tr 42-43. Such a certificate is not evidence of title or ownership. The Navemar, 303 US 68, 73.
[12] Tr 44, 46.
[13] Tr 49-51.
[14] 75 F. Supp. x.
[15] 77 F. Supp. x.
[16] Tr 52, 57.

Transmaritima's answer pleads in defense, certain provisions of the Carriage of Goods by Sea Act of the United States,[17] and "invokes the benefit of the provisions of the Revised Statutes of the United States . . . in limitation of the liability of shipowners." [18]

Respondent Caribe, with its answer, filed "Exceptions and Objections to Libelants' Interrogatories." The interrogatories sought sworn information as to the formation of Caribe and the circumstances surrounding transfer of the vessel.[19]

These exceptions are stated to be based, in part, on the fact that the interrogatories "are aimed pointedly to obtain and 'fish' into the evidence." [20] The interrogatories are concededly aimed at obtaining, under direct oath of respondent's officers,[21] evidence in support of libelants' charges. The district court has never ruled on these exceptions, and libelants' interrogatories have never been answered.

Another ground of exception to the interrogatories really amounts to admission of the charges contained in the libel, for the respondent avers that the "interrogatories refer to matters which are, in view of the supplemental and amended libel, known to the libelants." [22]

And yet proctor for Caribe has protested volubly that "not a shred of evidence in any form was offered . . . to

[17] 49 Stat. 1207-13, 46 USC 1300-15.
[18] 27 Stat. 445, 46 USC 192.
[19] Tr 59-60.
[20] Tr 59.
[21] As required under Admiralty Rule 31, rather than on hearsay by proctor as in his motion to dismiss.
[22] Tr 60.

prove any of the allegations of fraud" [22] made in the suplemental libel!

In this connection, it is pointed out that the dissenting judge of the Court of Appeals took "issue with the statement of the majority that" libelants had not "proved anything at all in support of their contention;" and he called attention to "the fact that libelants introduced portions of the records" in other related cases pending in other federal courts, the evidence in which "strongly tends to show some connection between the two respondents, and sheds considerable doubt on the good faith of the alleged transfer." [23]

On August 17, 1948, proctor for respondents again moved to dismiss the libel and vacate the attachment on substantially the same grounds as theretofore urged and overruled, with the added suggestion that the district court, sitting in admiralty, was without jurisdiction to determine the validity of the transfer of the vessel. [24]

In support of this renewed motion, proctor for respondents submitted another document in the form of an affidavit by himself, on information and belief, expanding somewhat on his prior statement, and alleging that the controlling interests in the two corporations are substantially different, although disclosing that Walter W. Keene

[22] Brief of repondent in opposition to petition for certiorari, p. 6. See also ibid, *passim*, and p. 20, referring to "petitioners' rights" which "rested upon facts which they alleged but could not prove".

[23] Tr 140. It is significant too, that various "gear, hoists, winches, etc., from the M V Cali," concededly the property of Transmaritima, were still on board the S S CARIBE, allegedly no longer belonging to Transmaritima, when that vessel was attached in this proceeding. Tr 11, 21.

[24] Tr 61-63.

and Eulogio Echaverri, stated to be managing director and "sub-manager" respectively of both companies, owned 51 out of 100 shares of Transmaritima, and 47 out of 50 shares of Caribe.[26] This document also called attention to other proceedings on the same causes of action instituted by libelants in New York and Texas against the same respondents, and against Keene as effective owner of both.[27]

Proctors for libelants were given only a few days' notice of hearing on respondent's motion to dismiss.[28] The answers of both respondents had previously been filed on the same day by the same proctor, and both answers contained prayers for adjudication of title to the S S CARIBE. The case was ready for trial on its merits, and proctors for libelants had no reason to believe that evidence in support of their position was to be adduced before trial.[29]

Further, the original motion to dismiss had been overruled by the court, and it seemed inconceivable that a successor judge would disregard that ruling and sustain

[26] There is, of course, no inference of difference in substantive interests in control of the two corporations to be drawn from the fact that some of the remaining shares are held nominally by different holders. The real ownership interests can be shown only after libelants' searching interrogatories shall have been answered, and the witnesses subjected to cross-examination on the trial.

[27] Tr 63-70. Excerpts from the proceedings in these cases which "reveal that Walter W. Keene, one of the principal stockholders, and director and manager of both respondent corporations" treated them "as his personal chattels" and "personally collected the insurance" on the M/V Cali (dissenting opinion of Judge McCord in the Court of Appeals, Tr 140) are in the transcript of the instant case. Tr 83-106.

[28] The motion was filed in the Canal Zone on August 17. The date fixed for the hearing, later postponed, was August 23. Tr 60.

[29] "I do not believe it fair or just to thus penalize libelants as derelict in failing to prove their case . . . before they have had a reasonable opportunity to do so by testimony at a fair hearing." Dissent of Judge McCord on petition for rehearing to Court of Appeals. Tr 156.

the motion so renewed. Accordingly, no evidence was introduced in behalf of libelants at the hearing of the renewed motion to dismiss.

On September 20, 1948, the new district judge sustained the motion to dismiss the libel and vacate the attachment, holding that he was without jurisdiction, sitting in admiralty, to determine whether the transfer of the vessel was valid, such inquiry being one to "be undertaken in the courts of the Republic of Colombia;" and, "in any event, this court as an admiralty court has the right to refuse the assumption of such non-maritime jurisdiction and... does refuse to...inquire into any alleged scheme or device which may exist or may have been entered into between the two respective respondents in the Republic of Colombia." [30]

Libelants applied for a rehearing,[31] and in support of their application offered the records in related proceedings pending in other federal courts,[32] to which reference has already been made. The evidence in these records impressed the dissenting judge of the Court of Appeals as strongly supporting libelant's allegations of fraud.[33]

On November 5, 1948, the district court rendered its opinion denying the rehearing, holding that on the face of the libel as amended, the court, as a court of admiralty, had no jurisdiction to inquire into the question as to whether the transfer of the vessel was fictitious and in

[30] Tr. 72-78. Under its quoted ruling, the district court felt that "it must be held that the vessel Caribe . . . was at the time of" her attachment "the property of" Caribe. Tr 77.
[31] Tr 78-80.
[32] Tr 83-106.
[33] Tr. 140.

fraud of libelants' rights; that on the face of the pleadings title to the vessel had passed to Caribe; and that, until a Colombian court should annul the transfer as fraudulent, the vessel "is the property of" Caribe, and "is not subject to the foreign attachment" in the Canal Zone.[34]

The decree of the district court, entered November 10, 1948, recites that the court has found that the Steamship CARIBE "was solely owned" by Caribe; and, then, only after ordering release of the vessel from attachment, requires Caribe, within thirty days thereafter, to "make answer as garnishee respecting any and all funds, indebtedness, money or property which it owes or has in its hands, belonging to" Transmaritima.[35]

Significantly, libelant's interrogatories annexed to its amended libel, seeking sworn information as to Caribe's formation by the interests in control of Transmaritima, and as to the purported transfer of the vessel, were never required to be answered prior to the entry of the order realeasing her attachment.

Libelants appealed from this decree,[36] and on May 30, 1949, the Court of Appeals for the Fifth Circuit affirmed the decree, Judge McCord dissenting.

The majority of the Court of Appeals conceded that the "affidavit evidence and the exhibits" were "not of the most satisfactory kind," but held that these were sufficient to place the burden on the libelants, under the motion to

[34] Tr 107-113.
[35] Tr 114-116.
[36] Tr 116-126.

dismiss the libel and vacate the attachment, "to show some cause why the vessel should be held as the property of respondents";[37] that there had been "no adjudicatoin of respondents";[37] that there had been "no adjudication sitting in admiralty, to determine whether a transfer is fraudulent at the instance of one whose claim has not yet been reduced to judgment, "is doubtful;"[38][39] and that, in any event, "there is discretion, as the court held, to refuse enquiry, even if there be jurisdiction, where the case is about foreign business and the transaction was between foreigners. . ." [40]

Judge McCord dissented because of the "far reaching effect and import" [41] of the majority opinion as a precedent, which, he stated, "appears to be that when foreign ship owners are about to be haled into our courts to answer for their negligence they may escape liability by a fraudulent transfer and sale of their vessels in a foreign jurisdiction, and thereby effectively oust our Federal courts of admiralty jurisdiction in attachment proceedings." [42]

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[37] Tr. 132. In his dissent, Judge McCord stated that "it was not incumbent upon libelants to prove their case by their pleadings"; and he took sharp "issue with the statement of the majority" that libelants had not "proved anything at all to support their contention . . . that the vessel is really the property of respondents." Tr 140, 141.

[38] Tr 133. See also opinion on application for rehearing, tr 154. As hereinabove noted, the district court had held in both its opinions (Tr 77, 111-112) as it had found in its decree (Tr 114) that the vessel was "solely owned" by Caribe. As stated by Circuit Judge McCord in his dissent on the petition for rehearing: "Although the majority claim there has been no adjudication of the title to the seized vessel . . . their decision is predicated on the theory that the respondent Caribe is the true owner of the vessel . . . They are actually deciding the case on its merits adversely to libelants without according them the hearing to which they are entitled." Tr 156.

[39] Tr 133.

[40] Ibid. "We have not held that the libel *in personam* was wholly between foreigners, and that jurisdiction over it might be for that reason declined." Opinion of majority on petition for rehearing, tr 154.

[41] Tr 134.

[42] Tr 141.

He called attention to the fact that Swift & Company, "who owned half of the entire cargo of the lost vessel, is a citizen of the United States";[43] that Transmaritima itself had claused its bills of lading under which the lost cargo was shipped, as having effect "subject to the Carriage of Goods by Sea Act of the United States";[44] and that "the carrier knew, or should have known that it was dealing with a citizen of the United States as the ultimate owner of fifty per cent of the entire cargo of the vessel."[45]

On these facts, Judge McCord was "inclined to the view that the district court had no discretion to decline jurisdiction", but that, "even if there be such discretion, the district court clearly abused its discretion in declining to exercise its jurisdiction on a mere summary motion to vacate the attachment, supported only by incompetent and hearsay affidavits and exhibits, when the jurisdictional facts were clearly in dispute."[46]

Judge McCord further found that "since the original judge in the above ruling had already considered the question of declining jurisdiction *as a matter of discretion*, libelants were entitled to rely upon his ruling, and the question of whether he properly exercised his discretion

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[43] Tr 137.

[44] Tr 139. Of particular significance in light of respondents' contention that the case is beyond the jurisdiction of the courts of the United States, are the defensive pleas in the answer of one respondent based on the Carriage of Goods by Sea Act (Tr 53, 54), and that it "invokes the benefit of the provisions of the Revised Statutes of the United States . . . in limitation of the liability of shipowners": Tr. 55.

[45] Tr 139. The name of Swift & Company appears as notify party on the bills of lading. Tr 33, 36.

[46] Tr 137.

on the original motion was hardly open for review or further consideration by his successor in office." [47]

And Judge McCord concluded significantly: "In the present state of the record, no one can truthfully say whether libelants are entitled to relief against anyone, but surely they are entitled to be heard." [48]

IV

Specification of Errors

1. The court erred in holding that a district court of the United States, sitting in admiralty, does not have jurisdiction to determine for itself whether a vessel seized under its own process of foreign attachment had been transferred fraudulently by the foreign respondent a few days prior to the attachment for the purpose of avoiding it, actually remains subject to attachment as property of the respondent.

2. The court erred in holding that a district court of the United States, sitting in admiralty, has discretion to decline jurisdiction of a proceeding instituted by a citizen of the United States and others, by process of foreign attachment, against foreign respondents, for loss of cargo moving between foreign ports under bills of lading expressly made subject to the Carriage of Goods by Sea Act of the United States, one of respondent's defenses being a plea of limitation of shipowner's liability under statutes of

[47] Tr 139. In his opinion on rehearing, the successor district judge himself pointed out that the motion which he sustained was that of March 15, 1948, which his predecessor had overruled. Tr 107.
[48] Tr 156.

the United States, and involving an issue as to whether a purported transfer by the respondent of the vessel attached, a few days before the attachment for the purpose of avoiding it, was fictitious and fraudulent.

3. The court erred in holding that the question as to whether a district judge of the United States, prior to his retirement, properly refused to decline discretionary jurisdiction of a proceeding in admiralty, is open to review by his successor in office.

4. The court erred in holding that a mere proctor's affidavit on information and belief, to the effect that a vessel seized under process of foreign attachment is not owned by the respondent, filed in support of a motion to dismiss the libel which alleges recent fraudulent transfer of the vessel to avoid the attachment, places on the libelant the burden of showing why the vessel should be held and jurisdiction maintained to escape summary dismissal of the proceeding.

V

Argument

Point A

A district court of the United States, sitting in admiralty, has jurisdiction to determine for itself whether a vessel seized under its own process of foreign attachment had been transferred fraudulently by the foreign respondent a few days prior to the attachment for the purpose of avoiding it, and actually remains subject to attachment as property of the respondent.

The district judge held that he had no jurisdiction, as a court of admiralty, to adjudicate the issue as to whether the vessel attached was actually the property of respondent,[1] and the majority of the Court of Appeals held the jurisdiction to be "doubtful."[2]

One must not let the forest obscure the trees. The proceeding is one by a citizen of the United States for loss of cargo. The proceeding was instituted by foreign attachment. The respondents contend that a few days before the attachment, the vessel attached had been transferred by the respondent alleged to be at fault in the loss of the cargo, to the other respondent. Libelants contend that the transfer was fictitious and in fraud of their rights.

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[1] Tr 111.

[2] Tr 133. "We held only that the question of the organization of the corporation Caribe and its relationship to the corporation Transmaritima, and its liability for the latter's debts, involved transactions in the Republic of Colombia and under its laws, with the witnesses and evidence located there, and that the supplementary libel *in personam* against Caribe might be dismissed for that reason." Opinion of majority of Court of Appeals on application for rehearing, tr 154.

This controversy as to transfer of the vessel, is clearly only incidental to the main issue for negligent loss of cargo. Can it be said that a citizen of the United States may be deprived of access to the courts of his own country, by such a device used by foreign respondents, and that a court of the United States may say that the legality of the device may be determined only by the courts of respondents' country, and that accordingly the United States is without effective jurisdiction, in the main controversy, to hold the security under its attachment?

Respondent Transmaritima had not been cited except through the attachment. But it hastened into court to plead that the property attached did not belong to it, and that the attachment should be dissolved, while submitting itself without security to the jurisdiction of the court for adjudication of the claim for cargo damage against it.

The majority of the Court of Appeals sanctioned dissolution of the attachment which stood as security for the cargo claim, on the ground that the district court was without jurisdiction to determine that the vessel attached had been transferred fraudulently by the respondent a few days prior to the attachment.

While, therefore, as stated by the majority of the Court of Appeals, technically "jurisdiction has not been declined but retained"[3] against Transmaritima alone, jurisdiction has in fact been declined on the important issue of fraudulent transfer of libelant's security under attachment *pendente lite*. And a judgment rendered against a foreign corporation in such a proceeding, "where there is no

[3] Opinion on application for rehearing, tr 154.

security under court attachment, is practically worthless, for there would be no process enforceable against it."[4]

As stated by the dissenting judge of the Court of Appeals in the case at bar: "The import of this decision, as precedent, appears to be that when foreign ship owners are about to be haled into our courts to answer for their negligence they may escape liability by a fraudulent transfer and sale of their vessels in a foreign jurisdiction, and thereby effectively oust our federal courts of admiralty jurisdiction in attachment proceedings."[5]

It may be, as suggested by the majority of the Court of Appeals, that "there is no precedent" for the right of a court of admiralty to take jurisdiction of a case to determine whether property has been transferred in fraud of a creditor "before a judgment has been obtained" against the person alleged to have effected the fraudulent transfer.[6]

It is submitted, however, that such cases as *Lee vs Thompson*,[7] *Gardner vs Dantzler*,[8] and the others cited by the dissenting judge of the Court of Appeals[9] are so closely analogous in their holdings and dicta as to constitute precedents for the point involved.

It is further submitted that if these cases are not directly in point, and, as held by the majority of the Court of

[4] Dissenting opinion of Judge McCord, tr 140.
[5] Tr 141.
[6] Tr 133.
[7] Fed. Cas. 8202.
[8] 98 F2d 478 (CCA 5).
[9] Tr 136.

Appeals, "there is no precedent" for the point, this court should settle this important question of federal jurisdiction, and should hold that an admiralty court of the United States is competent to determine whether property seized under its process of foreign attachment belongs to the respondent, and whether a transfer thereof was fictitious and fraudulent for the very purpose of avoiding the attachment.

Point B

A district court of the United States, sitting in admiralty, has no discretion to decline jurisdiction of a proceeding instituted by a citizen of the United States and others, by process of foreign attachment, against foreign respondents, for loss of cargo moving between foreign ports under bills of lading expressly made subject to the Carriage of Goods by Sea Act of the United States, one of respondent's defenses being a plea of limitation of shipowner's liability under statutes of the United States, and involving an issue as to whether a purported transfer by the respondent of the vessel attached, a few days before the attachment for the purpose of avoiding it, was fictitious and fraudulent.

As shown in the statement of facts, half of the cargo of the lost vessel was owned by Swift & Company Packers, a citizen of the United States. Its name appears on the bills of lading issued for the cargo.

Proctors for respondent have urged that because Swift & Company became the holder in due course of the bills

of lading for the cargo subsequently lost, by transfer from the foreign shipper to whom they had originally been issued, Swift stands in the shoes of the foreign shipper, "and the court may nevertheless decline jurisdiction at discretion." [10]

It is, however, a fundamental principle of the law of carriage of goods, that the bona fide holder of a bill of lading is entitled to sue in his own right for breach of the contract of carriage.[11] "It makes no difference that libelants severally bought interests in the rice cargo while in transit, as they were nevertheless entitled to safe delivery of their respective property." [12]

The bills of lading contain an express provision to the effect that they are subject to the Carriage of Goods by Sea Act of the United States.[13] One of the foreign respondents, in its answer, further "invokes the benefit of the provisions of the Revised Statutes of the United States . . . in limitation of the liability of shipowners." [14]

Joined with the citizen of the United States as libelants are several citizens of Cuba and one of Colombia, each, however, suing for his own interest. The cargo was moving from a port in Ecuador to ports in Cuba when it

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[10] Brief in opposition to petition for certiorari, p. 15.
[11] The Steamship Thames vs Billop Seaman, 14 Wall. (81 US) 98.
[12] Dissenting opinion of Judge McCord, tr 139.
[13] 49 Stat. 1207-1213; 46 USC 1300-1315. "This bill of lading shall have effect subject to the Carriage of Goods by Sea Act of the USA, and the carrier and the ship shall be entitled to all of the rights and immunities set forth in said Act. To the extent that any term of this bill of lading is repugnant to, or inconsistent with anything in such Act, it shall be void." Tr 34, 37, 40. In its answer, one of the respondents pleads that it "is entitled to all exemptions and defenses provided for" in a section of that act, and that it "is excused from liability under the appropriate section of the" act. Tr 53, 54.
[14] Tr 55.

was lost. Both respondents are, on the record, Colombian corporations. Questions of foreign law may be involved in a determination of the issue as to validity of the purported transfer of the vessel between the respondents.

A citizen of the United States should not be denied access to the courts of his own country merely because his case involves a question as to whether a purported transfer between foreign respondents among themselves was fictitious, especially when the citizen of the United States pleads that the transfer was in fraud of his rights.

The main issue of the case, it must be remembered, centers around a claim for lost cargo shipped under a bill of lading whose provisions are, by their own terms, to be construed under a statute of the United States, specifically pleaded by way of defense, in the answer.[15] One of the foreign respondents further invokes another statute of the United States by way of defense. That respondent "knew, or should have known, that it was dealing with a citizen of the United States, as the ultimate owner of fifty per cent. of the entire cargo of the vessel." [16]

No direct precedent has been found holding that in such a case, a district court of the United States has no discretion to decline jurisdiction. Cases which hold that exercise of discretion on the part of a district judge in declining to take jurisdiction of proceedings in admiralty exclusively between foreigners will not be disturbed unless abused,[17] obviously do not sanction such an exercise of discretion as

[15] Tr 53, 54.
[16] Dissenting opinion, tr 139.
[17] Canada Malting Company vs Paterson Steamships, 285 US 413; Charter Shipping Co. vs. Bowring, 281 US 515.

to a proceeding instituted by a citizen of the United States, even when joined by non-citizens appearing exclusively for the assertion of their own separate interests.

It is submitted, however, that the holding of this court in *In re Louisville Underwriters*,[18] is equally applicable to the situation at bar: "To compel suitors in admiralty ...to resort to the home of the defendant, and to prevent them from suing him in any district in which...his goods or credits (may be) attached...would in many cases amount to a denial of justice." [19]

It is respectfully submitted that a district court must accept jurisdiction in such a case, and may not, in its discretion, decline to do so.

Point C

The question as to whether a district judge of the United States, prior to his retirement, properly refused to decline discretionary jurisdiction of a proceeding in admiralty, is not open to review by his successor in office.

It will be recalled that respondents originally filed a motion to dismiss and vacate the attachment for want of jurisdiction, on March 15, 1948. This motion was denied on March 31 by the district judge then in office. He retired on the following day.

Later, a successor judge was appointed, a second motion to dismiss and vacate was filed, and the matter was sub-

[18] 134 US 488.
[19] Ibid., at p. 493.

mitted to him. He expressly sustained the first motion,[20] stating that he declined, in any event, to exercise his right to take jurisdiction.[21]

In other words, the first judge exercised his discretion, if he had it, to take jurisdiction of the case when the matter came up under the motion filed March 15. His successor reviewed that exercise of discretion, reversed it, and declined to take jurisdiction under the same motion.

No precedent has been found directly on this point. It has been held, however, that the exercise of discretion by a district court as to whether it will entertain an action in admiralty solely between foreigners will not be disturbed, even on appeal, unless the discretion has clearly been abused.[22]

It is submitted that a district judge should not be permitted to hold that his predecessor had abused his discretion in taking jurisdiction of a case, reverse that discretion, and dismiss the proceedings.

Point D

A mere proctor's affidavit on information and belief, to the effect that a vessel seized under process of foreign attachment is not owned by the respondent, filed in support of a motion to dismiss the libel which alleges recent fraudulent transfer of the vessel to avoid the attachment, does not

[20] "The motion on which the court acted was filed herein on March 15, 1948 . . ." Tr 107.

[21] Tr 77.

[22] Canada Malting Co. vs Paterson Steamships, 285 U S 413; Charter Shipping Co. vs Bowring, 281 U. S. 515.

place on the libelant the burden of showing why the vessel should be held and jurisdiction maintained to escape summary dismissal of the proceeding.

Respondent's motion to dismiss was supported by affidavit of respondent's proctor "which is mainly a legal argument," [23] together with an opinion by a Colombian attorney to the effect that "the Courts of justice of the Canal Zone are absolutely incompetent to decide regarding a claim of this nature." [24]

This motion was treated by the majority of the Court of Appeals as having been made pursuant to Rule 23 of the District Court of the Canal Zone [25] providing that, in proceedings by foreign attachment, upon evidence showing "any improper practice or a manifest of equity on the part of libelant", any interested party may obtain an order from the judge requiring the libelant to show cause why the attachment should not be vacated.

"The motion on which the (district) court acted", filed "on March 15, 1948," [26] contains no mention of, nor reference, direct or indirect,[27] to Rule 23. The district court itself, in its first opinion, treated the motion as one for "summary judgment under Rule 12b of the Federal Rules of Civil Procedure." [28]

Rule 23 of the Canal Zone district, as pointed out by the dissenting judge of the Court of Appeals in the case at bar, "shows clearly on its face that it is not applicable to

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[23] Tr 129.
[24] Tr 46.
[25] Tr 132.
[26] Tr 107.
[27] Tr 25-26.
[28] Tr 74. On rehearing, the court conceded that it had erred in this regard.

the instant proceeding", because it "is clear to the effect that unless competent evidence of either an 'improper practice' or a 'manifest want of equity' on the part of libelant be shown, the order to show cause why attachment should not be vacated will not issue"; [29] and he found that "there was no competent evidence whatever introduced in support of the motion to dismiss...nor was there any substantial conformity or compliance with Admiralty Rule 23." [30]

The majority of the Court of Appeals held that while the affidavits and exhibits were "not of the most satisfactory kind", and constituted "mainly a legal argument", they were nevertheless sufficient "to require the libelants to show some cause why the vessel should be held as the property of respondent." [31]

The only evidence before the district court in behalf of respondents were the affidavits of their proctor, made on information and belief, and certain exhibits annexed to those affidavits. The Federal Rules of Civil Procedure apply, by analogy and in the absence of conflicts, to proceedings in admiralty.[32] Rule 56(e) provides: "Supporting ...affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Copy of a vessel's registry has been held by this court not to constitute evidence of title or ownership.[33] There

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[29] Dissenting opinion, tr 138.
[30] Ibid.
[31] Opinion, tr 129, 132.
[32] Untersinger vs United States, 172 F2d 298 (CCA 2).
[33] The Navemar, 303 US 68.

is ample precedent that foreign law must be proven in admiralty as any other fact, and will not be accepted on a mere certificate.[34] A district court of the United States should, in any event, hardly accept, as having evidentiary value, the opinion of a Colombian lawyer to the effect "that the Courts of justice of the Canal Zone completely lack jurisdiction to make a decision on the claim against" two Colombian corporations.

There would seem to be a direct conflict on this point between the decision of the majority of the Court of Appeals for the Fifth Circuit in the case at bar, and that of the Court of Appeals for the Ninth Circuit in *The Celtic Monarch*.[35] In the cited case, attachment of a vessel under a libel *in rem* for collision damage was sought to be vacated under a rule of the district court of Washington, precisely the same as that of the Canal Zone court.

An answer was filed, setting up defenses to the libel, including new facts. On this answer, supported by two affidavits of eye-witnesses to the collision, the claimant of *The Celtic Monarch* moved for summary dismissal of the attachment under Rule 35 of the district court of Washington, identically the same in its terms as Rule 23 of the Canal Zone district invoked at bar.

The Washington district court accepted as true the new facts in the answer and supporting affidavits, and held the case to be one subject to summary judgment under its local Rule 35, which might be "finally disposed of in this

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[34] Christie vs Carlisle, 11 F2d 659 (ED La.); Avalon-Presidente Wilson, 1929 AMC 1602 (SD NY); The Hanna Neilson, 25 F2d 984 (WD Wash.).

[35] 138 Fed. 711 (CCA 9).

summary proceeding, resembling a motion for judgment on the pleadings in an action at law."

The Court of Appeals reversed. It pointed out that Admiralty Rule 51 (now 48) provides that new facts pleaded by a respondent are deemed denied by the libelant, and it could "see no possible justification" for summary dismissal of attachment of a vessel in admiralty on answer and affidavits involving issues forming part of the merits of the controversy: "Upon these issues the libelant was clearly entitled to give evidence, and it is manifest that the merits of the cause could not properly be disposed of in advance of the determination of those issues." [36]

In the case at bar, proctor's "affidavit which is mainly a legal argument" [37] in support of respondent's motion to dismiss, should certainly be given no greater evidentiary weight than was the answer of the claimant supported by two eye-witness affidavits in the cited case.

The motion to dismiss, and supporting proctor's affidavit, were at most simply a defensive plea which "alleges new facts . . . considered as denied by the libelant," [38] raising issues to be determined on the trial of the merits of the entire controversy, and not under a local rule providing for summary dissolution of an attachment obtained by "improper practice."

In the case at bar, involving a situation at least closely analogous to that in the cited case, the majority of the Court of Appeals for the Fifth Circuit upheld release of

[36] Ibid., at p. 718.
[37] Tr 129.
[38] General Admiralty Rule 48.

attachment of the vessel by the district court on summary process by affidavit under an identical local rule, saying: "The affidavit evidence and the exhibits, while not of the most satisfactory kind, were enough under this rule to require the libelants to show some cause why the vessel should be held as the property of respondents. Neither on the hearing, nor on the rehearing...have libelants proved anything at all to support their contention [39] ...As a summary remedy the motion to vacate was properly sustained." [40]

The close analogy between the two cases, and the conflict in the holdings of the Courts of Appeals for the Fifth and Ninth circuits, are emphasized in the language of the dissent in the case at bar, strikingly similar to that of the Ninth Circuit, quoted above: [41] "They (the majority) are actually deciding the case on its merits adversely to libelants without according them the hearing to which they are entitled." [42]

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[39] The dissenting judge took "issue with the statement of the majority" that libelants had failed to offer such proof. "Evidently," he said, "they ignore the fact that libelants introduced . . , testimony of disinterested parties in other proceedings in the Federal courts" which "sheds considerable doubt on the good faith of the alleged transfer." Tr 140.

[40] Opinion, tr 132-133.

[41] See footnote 36, supra.

[42] Opinion on application for rehearing, tr 156.

CONCLUSION

It is accordingly respectfully submitted that the decision of the majority of the Court of Appeals for the Fifth Circuit, should be reversed, and the case remanded for trial on its merits.

Respectfully submitted,

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DEUTSCH, KERRIGAN & STILES;
Of Counsel.

New Orleans,
November, 1949.

This is to certify that copies of this brief have been served on opposing counsel on this the ..... day of November, 1949.

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